80-809

Supreme Court, U. S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

LITTON SYSTEMS, INC.,
Petitioner,

v.

ALVIN L. LUNDY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KARL WIESENBURG, ESQ.
WIESENBURG & REED
Post Office Box 1428
Pascagoula, Mississippi 39567
(601) 762-3255
Attorney for Petitioner.

Of Counsel:
JOHN H. CARLSON, ESQ.
Post Office Box 149
Pascagoula, Mississippi 39567

ROBERT L. ACKERLY, ESQ.
816 Connecticut Avenue, N.W.
Washington, D.C. 20006

Washington, D.C. • THIEL PRESS • (202) 638-4521

THE QUESTION PRESENTED FOR REVIEW

(1) Do the 1972 amendments of LHWCA permit a covered shipbuilder employee to maintain a 33 U.S.C. Section 905(b) third party negligence action against his shipbuilder employer for injuries recieved on a launched destroyer in the process of construction in its shipyard, notwithstanding the exclusive compensation remedy provisions of 33 U.S.C. Sections 905(a) and 933(i) of the Act?

TABLE OF CONTENTS

Page

THE QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS DELIVERED IN THE COURTS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT 4

I. The Court of Appeals decision conflicts with the decisions of this Court 4

II. The Court below has decided an important question of first impression which should be settled by this Court 10

III. The Court of Appeals has rendered a decision in conflict with the decisions of other courts on the same matter 15

CONCLUSION 19

APPENDICES:

Appendix A – Opinion of the 5th Circuit Court of Appeals, Aug. 20, 1980 ..... 1a

Appendix B – Judgment of the U.S. District Court for the Southern District of Mississippi, Dec. 11, 1978 ..... 4a

Appendix C – Memorandum to counsel from the Office of the Clerk, 5th Cir. Court of Appeals, August 20, 1980 ..... 5a

Appendix D – Order of the 5th Cir. Court of Appeals, Oct. 8, 1980, denying Petition for Rehearing and Petition for Rehearing En Banc 7a

Page

Appendix E – Letter to Karl Wiesenburg from the Office of the Clerk, 5th Cir. Court of Appeals, Oct. 22, 1980, Granting Stay of Mandate 8a

Appendix F – Statutes Involved 10a

TABLE OF AUTHORITIES

Cases:

Alfred v. M/V Margaret Lykes, 398 F.2d 684 (5 Cir. 1968) 5, 15

Allied Towing Corp. v. Tatem, 580 F.2d 702 (4 Cir. 1978) 17

Arvidson v. Dillingham Corp., 462 F.2d 1 (9 Cir. 1972), *cert. denied*, 409 U.S. 983 (1972) 17, 18

Baker v. Pacific Far East Lines, Inc., 451 F.Supp. 84 (N.D. Ca. 1978) 17

Bloomer v. Liberty Mutual Ins. Co., 100 S.Ct. 925 (1980) 6, 8

Bossard v. Port Allen Marine Service, Inc., 624 F.2d 671 (5 Cir. 1980) 9, 13

Buna v. Pacific Far East Line, Inc., 441 F.Supp. 1360 (N.D. Ca. 1977) 17

Calbeck v. Travelers Insurance Co., 370 U.S. 116 (1962) 4, 9, 10, 13

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 6, 8

Duncan v. Dravo Corp., 426 F.Supp. 1048 (W.D. Pa. 1977) 17

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1970) 6, 7, 10, 19

Frankel v. Bethlehem-Fairfield Shipyard, Inc., 132 F.2d 634 (4th Cir. 1942), *cert. denied*, 319 U.S. 746 (1943) 5

Cases, continued: Page

Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1921) 4, 5, 9, 13

Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 41-44, (3 Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) 17, 18

Haas v. 653 Leasing Co., 425 F.Supp. 1305 (E.D. Pa. 1977) 5, 16

Hess v. Port Allen Marine Service, Inc., 624 F.2d 673 (5 Cir. 1980) 9, 13

Hollister v. Luke Construction, et al., 517 F.2d 920 (5 Cir. 1975) 6

Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. Morgan, 551 F.2d 61 (5 Cir. 1977) 11, 12

Lawson v. United States, 605 F.2d 448 (1979) 13

Murphy v. Woods Hole, Martha's Vineyard, et al., 545 F.2d 235 (1 Cir. 1976) 16, 18

Napoli v. Hellenic Lines, 536 F.2d 505, 509 (2 Cir. 1976) 17

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) 11, 13

Olsen v. Todd Shipyards Corp., 435 F.Supp. 568 (W.D. Wa. 1977) 13

Reed v. The Yaka, 373 U.S. 410 (1963) 15, 16, 17, 18

Smith v. M/V Captain Fred, 546 F.2d 702 (5 Cir. 1977) 17

Sun Ship, Inc. v. Pennsylvania, 100 S.Ct. 2432 (1980) 6

Williams v. Avondale, 452 F.2d 955 (5 Cir. 1971) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

LITTON SYSTEMS, INC.,

Petitioner,

v.

ALVIN L. LUNDY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A) appears at 624 F.2d 590. There was no opinion of the United States District Court for the Southern District of Mississippi. The order of that Court granting petitioner summary judgment is attached (Appendix B).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on August 20, 1980 (Appendix C). A petition for rehearing was denied on October 8, 1980 (Appendix D). The Court of Appeals stayed the mandate on October 22, 1980 (Appendix E). Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. Section 1254(l).

STATUTES INVOLVED

The statues which the case involves are 33 U.S.C. 902 (1), (2), (3), (4), & (21); 903(a); 905; 933(i). Their pertinent text is set forth in Appendix F.

STATEMENT OF THE CASE

On July 1, 1976 the petitioner was a shipbuilder prime contractor constructing new destroyers for the United States Navy. One of the destroyers, the DD966 had been launched and was in the process of construction while moored to a dock within the petitioner's shipyard, being prepared for builder's seatrials. The respondent, Alvin L. Lundy, a shipbuilder employee of the petitioner, was injured while working on the incomplete ship. He received full compensation for his injuries under Section 905(a) of the LHWCA.

After receiving full compensation from petitioner under the LHWCA, Mr. Lundy then brought an action against petitioner, plaintiff's shipbuilder employer, in the United States District Court for Southern District of Mississippi, claiming entitlement to damages: (a) pursuant to the Jones Act, 46 U.S.C. Section 688 *et seq.*, (b) pursuant to admiralty and general maritime law and (c)

pursuant to the provisions of LHWCA, 33 U.S.C. Section 905(b).

Petitioner moved in the District Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the complaint and alternatively for summary judgment pursuant to Rule 5(b).

On December 8, 1978 the District Court granted petitioner's motion for summary judgment. On December 11, 1978 the Court entered judgment dismissing the complaint, with prejudice.

On August 20, 1980 the Court of Appeals reversed the summary judgment. The opinion noted that the employee had abandoned his claims brought under general maritime law and the Jones Act. The Court said:

> ". . . we need only determine whether he has a claim under 33 U.S.C. Section 905(b). We find that he does, and accordingly, we reverse."

It then held that Section 905(b) of LHWCA was applicable because the incomplete destroyer under construction was a vessel under LHWCA and the petitioner shipbuilder was the owner of the vessel. The Court did not give its reason for such findings nor did it discuss the exclusive compensation remedies of the employer under Sections 905(a) and 933(i). Although the issues presented by this petition were again raised in the Court of Appeals by petitions for rehearing, the petitions for rehearing were denied without comment.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
THE COURT OF APPEALS DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Congress enacted LHWCA in 1927 to establish a workmen's compensation system for maritime employees whose injuries occured on navigable waters beyond the reach of state workmen's compensation statutes. The LHWCA makes the classic workmen's compensation trade-off between the employee's certainty of recovery on a no-fault basis and the limitation of his claim against his employer to the compensation specified in the statute. The currect 33 U.S.C. Section 905(a) [formerly Section 905] and 933(i) which makes the statutory compensation the employee's exclusive remedy against his employer has been part of the law since its enactment.

When Congress enacted the LHWCA in 1927, it was aware of this Court's prior holding in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, (1929) that:

(a) general admiralty jurisidiction extends to a proceeding to recover damages for a tort committed on a vessel in the process of construction when lying on navigable waters within the state, and,

(b) the applicable state compensation act (in the absence of a federal compensation act) is the exclusive remedy of the employee as against his employer.

In *Calbeck v. Travelers Insurance Co.*, 370 U.S. 116, (1962) this Court said:

> "Before the Longshoremen's Act was passed, this urt had sustained the validity of a state work-'s compensation statute as applied to injuries

> suffered by an employee engaged in the completion of a launched vessel under construction on navigable waters, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S. Ct. 157, 66 L. Ed. 321", * * *
>
> "There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; in every case, that is, where Jensen might have seemed to preclude state compensation. The statute's framers adopted this scheme in the Act because they meant to assure the existence of a compensation remedy for every such injury, * * *." (370 U.S. 116, 120-121, 82 S. Ct. 1197-1198, 1200)

Prior to the adoption of the 1972 amendments to LHWCA, all of the Circuit Courts of Appeal and District Courts followed the holding of this Court that the exclusive remedy of a shipbuilder employee against his shipbuilder employer for injuries received during the process of the construction of an incomplete ship is the compensation provided by the applicable compensation act. *Haas v. 653 Leasing Co.*, 425 F. Supp. 1305 (E. D. Pa. 1977), *Williams v. Avondale*, 452 F.2d 955 (5th Cir. 1971); *Alfred v. M/V Margaret Lykes*, 398 F.2d 684 (5th Cir. 1968); *Frankel v. Bethlem-Farifield Shipyard, Inc.*, 132 F.2d 634 (4th Cir. 1942), *cert denied*, 319 U.S. 746, (1943).

The adoption of the 1972 amendments did not change the exclusive compensation remedy provisions of the Act. Unamended Section 905(a) of the Act provides that the exclusive remedy of compensation liability is applicable to:

> "the employee * * * and anyone otherwise entitled to recover damages from such employer in law *or*

> *amiralty* on account of such injury or death." (emphasis added)

In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, (1974), this Court said:

> "Indeed, the 1972 amendments to the Harbor Worker's Act re-emphasize Congress' determination that as between an employer and its injured employee, the right ot compensation under the Act should be the employee's exclusive remedy." (417 U.S. 112, 94 S. Ct. 2178)

No other Court of Appeals or District Court prior to the decision in this case had held that a covered shipbuilder employee may mainttain a 33 U.S.C. Section 905(b) third party negligence action aginst his employer for injuries received while engaged in the completion of a launched vessel under construction in navigable water.

In *Hollister v. Luke Construction, et al*, 517 F.2d 920 (5th Cir. 1975), the first case to reach the Fifth Circuit after the adoption of the 1972 amendments to LHWCA by a covered shipbuilder employee against his employer for injuries received in the construction of a ship, the Court of Appeals held:

> "The fact that the barge here was only partially completed at the time of plaintiff's injury is thus dispositive of his claim based on Luke's alleged maritime negligence. (Citations omitted) [517 F.2d 922]

This Court considered the adoption of the 1972 amendments to LHWCA in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, (1979); *Bloomer v. Liberty Mutual Insurance Company*, 100 S. Ct. 925 (1980); and *Sun Ship, Inc. v. Pennslyvania*, 100 S. Ct. 2432 (1980). In each of these cases this Court, after

reviewing their legislative history, held that it was not the purpose of the 1972 amendments to change, *sub silento*, the longstatnding rules of federal maritime law applicable to maritime tort actions based on negligence.

In *Edmonds v. Compagnie Generale Transatlantique*, *supra*, this Court said:

> "Admiralty law is judge-made law to a great extent, *United States v. Reliable Transfer Co.*, 421 U.S.397, 409, 95 S.Ct. 1708, 1714, 44 L.Ed.2d 251 (1975); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 1650, 10 L.Ed.2d 720 (1963), and a longshoreman's maritime tort action against a shipowner was recognized long before the 1972 amendments, see *Pope & Talbut, Inc. v. Hawn*, 346 U.S. 406, 413-414, 74 S.Ct. 202, 207, 98 L.Ed.2d 143 (1953), as it has been since." (99 S.Ct. 2756)

This Court noted in note 6. to the quoted language:

> "33 U.S.C. Section 933(a), which was unchanged in 1972, states that when a longshoreman "determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive . . . compensation or to recover damages against such third person." Section 905(b), which was added in 1972, states that the longshoreman "may bring an action against [the shipowner] as a third party in accordance with the provisions of Section 933 . . ." (99 S.Ct. 2756)

In the same case, this Court said:

> "In 1972 Congress alighed the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. "One of the most controversial and difficult issues which [Congress was] required to

> resolve . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations." S. Rep. 8. By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S., at 112, 94 S.Ct., at 2177; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S., at 285-286, 72 S.Ct., at 279-280. Once Congress had relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned. Indeed, Congress might have intended to adopt the existing maritime rule even for third-party actions under the Act that are not within the admiralty jurisdiction, though we need not and do not reach that issue today." (99 S.Ct. 2763)

This Court in *Bloomer v. Liberty Mutual Insurance Company, supra,* said:

> "We are unwilling to attribute to Congress an intention to allow creation of a new liability irreconcilable with its general desire to reduce litigation." (100 S.Ct. 932)

The legislative history of the adoption of the 1972 amendments, enunciated by this Court in these cases, together with the explanation of the purpose of the 1972 amendments set out in the U.S. Code Congressional and Administrative News, Second Session 1972, pages 4698 through 4720, do not support that conclusion reached by the Court of Appeals in this case that

Congress intended this Court to overrule the holding in *Grant Smith-Porter Ship Co. v. Rohde, supra.*

The 1972 amendments evidence a contrary intent. The Congress added to Section 905(b) the following language:

> "If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel."

The word "persons" is defined in Section 902(1) as:

> "(1) The term person means individual, partnership, corporation, or association."

In adding the cited language to Section 905(b), equally applicable to both construction and repair services, the Congress followed the holding of this Court in *Calbeck v. Travelers Insurance Co., supra,* that there is no distinction under the LHWCA between the compensation remedy rights of employees engaged in repair services to a vessel, and the compensation remedy rights of employees engaged in the construction of a vessel.

On the day after the Court of Appeals' decision in this case, the Fifth Circuit in *Bossard v. Port Allen Marine Service, Inc.,* 624 F.2d 671 (5 Cir. 1980) and *Hess v. Port Allen Marine Service, Inc.,* 624 F.2d 673 (5 Cir. 1980) held that a contractor making ship repairs is not the owner or owner pro hac vice of the vessel being repaired, and the exclusive remedy of the employee of the contractor is for compensation under the LHWCA.

In our petition for rehearing we called to the attention of the Court of Appeals that such disparate treatment of employees of ship repair contractors and employees of

shipbuilder contractors was not justified under the LHWCA, nor the 1972 amendments.

We submit that the Fifth Circuit Court of Appeals made the same error in making such a unwarranted distinction between employees engaged in ship repair services to an incomplete vessel in navigable waters, as was made by the same Court of Appeals in *Calbeck v. Travelers Insurance Co., supra.*

We respectfully submit that the decision of the Court of Appeals in this case conflicts with the decisions of this Court cited above.

II.
THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FIRST IMPRESSION WHICH SHOULD BE SETTLED BY THIS COURT.

As noted by this Court in *Edmonds v. Compagnie Generale Transatlantique, supra,* this Court has granted certiorari to resolve questions that have arisen in the Circuit Courts of Appeals and the District Courts of the meaning of the 1972 amendments to LHWCA. [433 U.S. 256, (1979), note 5].

The decision of the Court below in this case raises important questions of federal law in resolving the meaning and application of the 1972 amendments, particularly Sections 902(1), (2), (3), (21) and Section 905(b) considered *in pari materia* with unamended Sections 905(a) and 933(i).

The Court below decided that under the 1972 amendments a shipbuilder employer constructing a new ship launched in navigable waters is the owner of a vessel within the meaning of 33 U.S.C. Section 902(21) and that Section 905(b) permits a shipbuilder employee to

bring a third party negligence action against his employer notwithstanding the exclusive remedy provisions of Sections 905(a) and 933(i).

In *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, (1977), this Court held that the 1972 amendments to LHWCA extended broad compensation coverage to covered employees, "including a ship repairman, shipbuilder and shipbreaker ." [33 U.S.C. 902(3)].

This Court in *Northeast Marine Terminal Co., Inc. v. Caputo, supra,* held, as did the Fifth Circuit Court of Appeals in *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. vs. Morgan, supra,* that the 1972 amendments should be liberally construed as to compensation coverage and that the Court "should take an expansive view of the extended coverage." (432 U.S. 268).

The questions decided by the court below in this case as to the meaning of the 1972 amendments do not involve the extension of compensation coverage, but do extend third party negligence actions under Section 905(b) in a manner not heretofore allowed by the LHWCA, nor recognized by federal maritime law, and at variance with the Congressional intent as set out in the legislative history of the 1972 amendments to LHWCA.

At the time of the plaintiff's injury, the court found that the ship was still under construction and was 97% complete. The ship was neither in navigation nor operable. At the time of his injury, the shipbuilder-employee was employed by the shipbuilder for the purpose of making the ship operable so that it could subsequently undertake builder's sea trails.

The court below found none of these facts controlling. Relying on its broad compensation coverage holding in

Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. Morgan, infra, it held that:

> "Incomplete ships upon which 33 U.S.C. Section 902(3) employees are working at a site which [sic] the coverage of the Act, 33 U.S.C. Section 903, are vessels within the meaning of 33 U.S.C. Section 902(21). The USS Hewitt was thus moored to the statute."

The decision of the Fifth Circuit Court of Appeals in this case cited no judicial precedent except its prior holding in *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. Morgan,* 551 F.2d 61 (5th Cir. 1977). Morgan was shipfitter helper apprentice working in a fabrication shop in the petitioner's shipyard in Pascagoula, Mississippi. He died when a steel plate he was cleaning fell on him. The Fifth Circuit held:

> "The work of shipbuilding, however, commences before there is a launched vessel . . . Shipbuilders who do the initial work to construct a vessel for launching are, nonetheless, just as engaged in shipbuilding as those who are completing the task after something is finished which can be called a ship." [551 F.2d 62]

The Court of Appeals held that all shipbuilder employees engaged in the construction of a ship are entitled to compensation under Section 905(a) of the LHWCA, and are also entitled to maintain a third-party negligence action against their shipbuilder-employer under Section 905(b) for the same injury.

It is settled law that a ship repair employee may not maintain a third-party negligence tort action against his contractor employer on the theory that the employer was an owner or owner *pro hac vice* of the vessel under repair either prior or subsequent to the adoption of the

1972 amendments. *Olsen v. Todd Shipyards Corp.*, 435 F.Supp. 568 (W.D. Wa. 1977); *Lawson v. United States,* 605 F.2d 448 (1979); *Bossard v. Port Allen Marine Service, Inc., supra;* and *Hess v. Port Allen Marine Service, Inc., supra.*

These courts rejected the thesis that a contractor repairing a ship is either the owner or owner pro hac vice of the ship being repaired. No ratinale would justify different treatment for a shipbuilder than for a ship repair employer. This Court expressly rejected such disparate treatment in *Calbeck v. Travelers Insurance Co., supra.*

This Court has consistently sought to maintain the integrity of the LHWCA as a workmen's compensation act. It has approved the broad and liberal interpreation of the Act for such purposes as reflected in *Northeast Marine Terminal Co., Inc. v. Caputo, supra,* without compromising its exclusive remedy provisions.

The Court of Appeals' decision in the instant case departs from the previous holdings of this Court under established federal maritime law that a covered employee cannot maintain a third party negligence action against his employer for injuries compensable under LHWCA sustained during the process of the construction of a new vessel. *Grant Smith-Porter Ship Co. v. Rohde, supra.*

The broad and sweeping language of the court below that the DD-966 (USS Hewitt), while under construction in the petitioner's outfitting dock within its shipyard, was "moored to the statute" because the respondent was a covered employee under the Act will open the flood gates to a multitude of third-party negligence actions by covered employees against their shipbuilder-employers.

There is no logical reason for holding that a contractor who is repairing a ship temporarily removed from navigation is not a vessel owner for the purpose of a 33 U.S.C. Section 905(b) negligence action, but that a contractor who is constructing a ship that has not been in navigation and has not been delivered to its owner is a vessel owner and thus exposed to dual liability in the face of the clear language of Sections 905(a) and 933(i).

The decision of the court below involves a question of paramount importance to the entire shipbuilding industry of the United States. The broad and sweeping *per curiam* decision of the Court of Appeals will open a Pandora's box of litigation, not only by shipbuilders but by every covered employee under the 1972 amendments.

The third party negligence actions allowed under Section 905(b) must be uniformly interpreated as to all categories of maritime employees covered by the Act. The decision of the Court of Appeals has converted the LHWCA from a workmen's compensation act to a third party negligence tort act.

We respectfully submit that this massive assault on the integrity of the exclusive compensation remedy provisions of the LHWCA should be reviewed by this Court, and that this Court should reaffirm its previous holdings that the LHWCA is a workmen's compensation act, notwithstanding the adoption of the 1972 amendments.

III.
THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

Respondent argued in the court below that his 33 U.S.C. 905(b) third party negligence action against the petitioner should be permitted on the theory that the launched, but incomplete ship, in the process of construction was a vessel owned by the petitioner under the doctrine of *Reed v. The Yaka*, 373 U.S. 410, (1963).

Prior to the adoption of the 1972 amendments to LHWCA the Fifth Circuit Court of Appeals considered The Yaka doctrine in the context of the same claim that respondent urged in the court below. In *Alfred v. M/V Margaret Lykes,* 398 F.2d 684 (1968), the Court of Appeals said:

> "Appellant urges that Avondale was either the owner or owner *pro hac vice* of the vessel, seeking to invoke the doctrine of *Reed v. The Yaka,* 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963). Accepting, arguendo, this claim, we consider it in the same light as the claim here asserted against Lykes. Neither The Yaka nor its lineal ancestor, *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), do good service to appellant here. They are inapposite. *Each one of those cases dealt with situations which arose with respect to a completed, commissioned vessel in service in navigation. * * * Appellant's exclusive remedy with respect to Avondale is under the Longshoremen's and Harbor Workers' Compensation Act, supra. . .*" (emphasis added) (398 F.2d 686)

We submit that this decision of the Court of Appeals correctly stated that applicable law both before the adop-

tion of the 1972 amendments to LHWCA and to the case before the Court. In a painstaking analysis of the applicability of the doctrine of *Reed v. The Yaka, supra,* to a case almost factually identical to this case, in *Haas v. 653 Leasing Co.,* 425 F.Supp. 1305 (1977), District Judge Edward R. Becker noted that the plaintiff in that case claimed:

> "* * * that his employer Sun Ship is liable to him notwithstanding the LHWCA compensation bar because of its role as an owner *pro hac vice* of the virtually completed hull which, though not a vessel in commerce, was nonetheless in navigable waters, hence subject to maritime jurisdiction. This argument proceeds from an analysis of the Supreme Court case of *Reed v. The Yaka,* 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963) and confronts the outer limits of what Judge Gibbons has described as the 'Sieracki-Ryan end-run.' As will be seen, we must reject the owner *pro hac vice* argument because of its inappliability (at least prior to the 1972 amendments to the LHWCA) to negligence as opposed to unseaworthiness claims, and grant Sun Ship's motion." [425 R.Supp. 1307 (1977)]

While, as Judge Becker points out, the doctrine of *Reed v. The Yaka, supra,* is not applicable to an incomplete vessel in the process of construction notwithstanding that it has been launched in navigable waters, there is a serious and unresolved conflict between the Circuit Courts of Appeal as to whether the *Reed v. The Yaka* doctrine applicable to completed ships in navigation has survived the adoption of the 1972 amendments to LHWCA.

The First Circuit (ruling by way of dictum), *Murphy v. Woods Hole, Martha's Vineyard, et al.,* 545 F.2d 235

(1 Cir. 1976), and the Ninth Circuit, *Arvidson v. Dillingham Corporation,* 462 F.2d 1 (9 Cir. 1972), *cert. denied,* 409 U.S. 983, (1972), have held that the extensive remedy of a covered employee is the compensation provided by the Act, and that the employees may not maintain a negligence action against his employer *qua* vessel.

District Courts within the Ninth Circuit have reached decisions consistent with the holding of that Circuit. *Buna v. Pacific Far East Line, Inc.,* 441 F.Supp. 1360 (N.D. Ca. 1977), and *Baker v. Pacific Far East Lines, Inc.,* 451 F.Supp. 84 (N.D. Ca. 1978), hold that such an action may not be maintained, notwithstanding the 1972 amendments.

The Second, Third, Fourth, and Fifth Circuits relying on *Reed v..The Yaka,* 373 U.S. 410, (1963), have taken contrary positions. *Napoli v. Hellenic Lines,* 536 F.2d 505, 509 (2nd Cir. 1976); *Griffith v. Wheeling Pittsburgh Steel Corporation,* 521 F.2d 31, 41-44, (3rd Cir. 1975), *cert. denied,* 423 U.S. 1054, (1976); *Allied Towing Corp. v. Tatem,* 580 F.2d 702 (4th Cir. 1978); and *Smith v. M/V Captain Fred,* 546 F.2d 702 (5th Cir. 1977). The District Court within those Circuits have likewise followed the holdings of the controlling appellate Court. *Duncan v. Dravo Corp.,* 426 F.Supp. 1048 (W.D. Pa. 1977).

In all of the cases cited, the vessel involved was a completed vessel in commerce or navigation and the Section 905(b) negligence action was against the shipowner.

The existing division in the Circuits is succinctly stated in *Buna v. Pacific Far East Line, Inc., supra,* as follows:

> "Thus, barring Section 905(b) negligence suits when the vessel owner is the employer is both log-

ical and consistent with the philosophy underlying workmen's compensation schemes.

"Second, negligence actions are not equivalent to actions based on the doctrine of seaworthiness for purposes of sidestepping the exclusive remedy language of the LHWCA. *Arvidson v. Dillingham Corp.*, 462 F.2d 1 (9 Cir.) *cert. denied*, 409 U.S. 983, (1972). Interpreting the pre-1972 amendment LHWCA, the *Arvidson* court saw a clear distinction between the traditional, absolute, and non-delegable obligation of a shipowner to provide a seaworthy vessel and ordinary negligence by that shipowner. The court concluded that the right to proceed against a vessel owner/employer should not be extended to negligence claims.

"The Court of Appeals for the First Circuit followed the *Arvidson* court in distinguishing between seaworthiness and negligence in deciding *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1976). Although the *Murphy* decision interpreted the pre-amendment law, the court criticized *Griffith* and discussed the 1972 amendments in concluding that an injured harbor worker's negligence action against his employer is barred by the exclusive remedy provision (Section 905) of the LHWCA." [441 F.Supp. 1367]

In view of the existing conflicts between the Circuit Courts of Appeal on the question of whether under the 1972 amendments a covered employee may bring a Section 905(b) action against his employer qua vessel, the holding in this case extending the *Reed v. The Yaka* doctrine to incomplete ships in the process of construction is certain to evoke further conflicting and irreconcilable holdings among the Circuit Court of Appeals and District

Courts. This Court should resolve such conflicts to decide the question raised but left unanswered in *Edmonds v. Compagnie Generale Transatlantique, supra,* in which this Court said:

> "* * * Indeed, Congress might have intended to adopt the existing maritime rule even for third-party actions under the Act that are not within the admiralty jurisdiction, though we need not and do not reach that issue today." [99 S.Ct. 2763]

CONCLUSION

Congress, in enacting the 1972 amendments to the LHWCA, stated in the legislative history of the Act that legal questions arising under 33 U.S.C. Section 905(b) negligence actions should be determined as a matter of federal law. Federal law is currently in a state of upheaval because of the opinion of the court below in this case. Shipbuilder-employers are now subject to third-party negligence actions by their shipbuilder-employees during any stage of construction of a new

ship notwithstanding that the employer has paid full compensation under Section 905(a) of the LHWCA to the covered employees.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

By: _____

KARL WIESENBURG, ESQ.
WIESENBURG & REED
Post Office Box 1428
Pascagoula, Mississippi 39567
(601) 762-3255
Attorney for Petitioner.

Of Counsel:
JOHN H. CARLSON, ESQ.
Post Office Box 149
Pascagoula, Mississippi 39567

ROBERT L. ACKERLY, ESQ.
816 Connecticut Avenue, N.W.
Washington, D.C. 20006

APPENDIX

APPENDIX A

Alvin L. LUNDY, Plaintiff-Appellant,

v.

LITTON SYSTEMS, INC.,
Defendant-Appellee.

No. 79-1061.

United States Court of Appeals,
Fifth Circuit.

Aug. 20, 1980.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GOLDBERG, TATE, and SAM D. JOHNSON, Circuit Judges.

PER CURIAM.

On July 1, 1976, plaintiff-appellant, Alvin L. Lundy, who is a meter calibrator, was working on the USS Hewitt, DD-966, when he fell through an escape hatch which had been left open by one of the ship's crew. At the time of the accident. the USS Hewitt, undergoing construction and preparations for sea trials, was 97% complete and moored in an outfitting dock. To recover for his injuries, appellant brought suit against his employer, Litton Systems, Inc., defendant-appellee, which was also owner of the ship. Appellant claimed entitlement to recovery under the doctrine of seaworthiness, the Jones Act, 46 U.S.C. §688, and the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b). He appeals from the district court's dismissal of his claims upon appellee's motion for summary judgment. Because appellant had abandoned his claims brought under the doctrine of seaworthiness and

the Jones Act, we need only determine whether he has a claim under 33 U.S.C. §905(b).[1] We find that he does, and, accordingly, we reverse.

The district court held that an incomplete ship was not a vessel for purposes of section 905(b). We disagree.

The definitional section of the LHWCA provides that "[t]he term 'vessel' means any vessel upon which or in connection with which a person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment . . . ." 33 U.S.C.A. §902(21)(West 1978). Persons entitled to benefits under the LHWCA are "employees." See *id* §903(a). "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-

---

[1] 33 U.S.C.A. §905(b)(West 1978) provides the following:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occured. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

worker including a ship repairman, shipbuilder, and shipbreaker . . . ." *Id.* §902(3). we have previously held that "[s]hipbuilders who do the initial work to construct a vessel for launching are . . . just as engaged in shipbuilding as those who are completing the task after something in finished which can be called a ship." *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. Morgan,* 551 F.2d 61 (5th Cir. 1977). Thus, incomplete ships upon which 33 U.S.C. §902(3) employees are working at a site which the coverage of the Act, 33 U.S.C. §903, are vessels within the meaning of 33 U.S.C. §902(21). The USS Hewitt was thus moored to the statute.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

[Filed Dec. 11, 1978]

Civil Action No. S78-0286(R)

ALVIN L. LUNDY,
Plaintiff,

v.

LITTON SYSTEMS, INC., A CORPORATION,
Defendant

JUDGMENT

This action came on for consideration before the Court, Honorable Dan M. Russell, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered granting the alternative motion for summary judgment of the defendant Litton Systems, Inc.,

IT IS ORDERED AND ADJUDGED that the alternative motion of the defendant Litton Systems, Inc. for summary judgment is granted and the complaint is dismissed, with prejudice.

Dated at Biloxi, Mississippi, this the 11th day of December, 1978.

HARVEY G. HENDERSON, Clerk

By: /s/ Agnes Dyesc
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

August 20, 1980

Gilbert F. Ganucheau
Clerk

Tel 504/589-2570
600 Camp Street
New Orleans, La. 70130

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 79-1061 – ALVIN L. LUNDY vs. LITTON SYSTEMS, INC.

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. *A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Local Rule 17 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ Clare F. Sachs
Deputy Clerk

enc.

cc: Mr. Bobby G. O'Barr
Mr. Karl Wiesenburg
Mr. French Caldwell

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Oct. 8, 1980]

No. 79-1061

ALVIN L. LUNDY,
Plaintiff-Appellant,

versus

LITTON SYSTEMS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(Opinion 8/20/80, 5 Cir., 197__, ___F.2d___).

(October 8, 1980)

Before GOLDBERG, TATE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

October 22, 1980

Gilbert F. Ganucheau
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

Mr. Karl Wiesenburg
Attorney at Law
P.O. Box 26
Pascagoula, MS. 35967

NO. 79-1061 – ALVIN L. LUNDY v.
LITTON SYSTEMS, INC.

MANDATE STAYED TO AND INCLUDING November 21, 1980

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court, effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore,

will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, CLERK

/s/ Jason Perkins
Deputy Clerk

/bh
enc.
cc: Mr. Bobby G. O'Barr

APPENDIX F

STATUTES INVOLVED

33 U.S.C. 902

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the couse of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operation, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to loan or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the couse of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. 903

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

33 U.S.C. 905

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason therof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall

not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. 933

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ; Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.